Office-Supreme Court, U.S.
FILED
SEP 12 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1633 and 82-1762

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOSPITAL BUILDING COMPANY,
Petitioner

v.

TRUSTEES OF THE REX HOSPITAL, *et al.*

TRUSTEES OF THE REX HOSPITAL, *et al.*,
Petitioners

v.

HOSPITAL BUILDING COMPANY

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

SUPPLEMENTAL BRIEF OF RESPONDENTS/CROSS-PETITIONERS IN OPPOSITION TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

RAY S. BOLZE
(Counsel of Record)
ROBERT J. BROOKHISER
RONALD K. PERKOWSKI
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

THOMAS W. STEED, JR.
NOAH H. HUFFSTETLER III
DEAN M. HARRIS
MOORE, VAN ALLEN & ALLEN
Post Office Box 2058
Raleigh, North Carolina 27602
(919) 828-4481

Counsel for
Respondents/Cross-Petitioners

Dated: September 16, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1633

HOSPITAL BUILDING COMPANY,
Petitioner

v.

TRUSTEES OF THE REX HOSPITAL, *et al.*

No. 82-1762

TRUSTEES OF THE REX HOSPITAL, *et al.*,
Cross-Petitioners

v.

HOSPITAL BUILDING COMPANY

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

SUPPLEMENTAL BRIEF OF RESPONDENTS/CROSS-PETITIONERS IN OPPOSITION TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

This supplemental brief is filed in response to the amicus brief of the United States which takes a position opposed to that of the Trustees of Rex Hospital as respondents in No. 82-1633 and as cross-petitioners in No. 82-1762.

I. THE GOVERNMENT'S ARGUMENTS IN SUPPORT OF CERTIORARI IN NO. 82-1633 MISAPPREHEND THE FACTUAL AND LEGAL ISSUES IN THE CASE

A. The Government's Concerns With Respect to the Implied Immunity Test Adopted by the Fourth Circuit Are Misplaced

In support of certiorari, the Government addresses an issue that is not before the Court because it was not decided by and, on the facts of the case, could not have been decided by, the Court of Appeals. The basic holding of the Court of Appeals was that voluntary health care planning activity enjoys a limited antitrust immunity if it is within the scope of conduct specifically contemplated by federal statutes which authorize and encourage such activity. (Pet. App. A at 9a-10a.) This is a straightforward application of the Supreme Court's opinions in *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U.S. 378 (1981), and *Silver v. New York Stock Exchange*, 373 U.S. 341 (1964), as well as the Government's own *amicus* position in *Gerimedical*.

The Government's concern that the Court of Appeals improperly applied the standard set forth in *Gerimedical* and *Silver* is apparently based on a misapprehension of the facts before the Court of Appeals. The Government characterizes the "anticompetitive conduct at issue here" as "an effort to exclude a competitor by [1] an abuse of the North Carolina administrative and judicial process and [2] a boycott with Blue Cross-Blue Shield . . . ." (Gov't Br. at 11-12.) Contrary to the Government's brief, the jury did not award damages for a "group boycott" or "refusal to deal" involving Blue Cross and its findings relevant to any alleged "abuse of process" were vacated on independent grounds for a new determination on remand.

1. Plaintiff did not ask the jury to award damages for any exclusionary conduct involving Blue Cross. The spe-

cial interrogatories presented to the jury allowed it to find damages if, and only if, the jury first found that the defendant hospital , *not* Blue Cross, had engaged in a sham opposition to plaintiff's Certificate of Need Application as part of a "larger plan" to violate the antitrust laws.[1] Interrogatory No. 6 reflected plaintiff's theory that its damages were caused only by the actions of the defendant hospital (not Blue Cross) in opposing plaintiff's application for a Certificate of Need before the relevant regulatory agency, the North Carolina Medical Care Commission ("MCC"), and the ensuing court appeal.[2]

2. Plaintiff's theory of *per se* liability at trial actually resolved around defendants' participation in health care planning activities in 1969-1972 and the effect of those activities on plaintiff's efforts to obtain approval for a

---

[1] Interrogatory No. 7 allowed the jury to award damages only if it answered "yes" to Interrogatory No. 6. Interrogatory No. 6 asked:

> Did the Acts committed by the defendants in connection with the Medical Care Commission's consideration of plaintiff's Certificate of Need application and/or in connection with the appeal to the Superior Court of Wake County constitute an abuse of the adjudicatory or judicial process which was part of a larger plan to violate the antitrust laws?

(Cross-Petition App. at 2a; Int. No. 6.)

[2] It is undisputed that Blue Cross was not involved in the opposition. The Government only states that subsequent to the opposition, Blue Cross reimbursed plaintiff at a "lower rate" and "refused to recognize certain HBC rate increases" (Gov't Br. at 3) and that "after HBC obtained authorization to expand, Rex sought to impede construction by conspiring with Blue Cross-Blue Shield to have that insurer demand different and more onerous terms from HBC than from Rex and Wake." (Gov't Br. at 5.) Those contentions are irrelevant because they were never decided by the jury. (*See* Interrogatory No. 6.) They were also refuted at trial by overwhelming and undisputed evidence that Blue Cross had in fact acted unilaterally and had used the same formula for reimbursing plaintiff that it had applied to non-profit hospitals. (*See* Respondent's Br. at 10-11; App. IV 1375; 1404-07; App. V 1939-41; 2021-22; App. VI 2275.)

hospital. As detailed in Respondents' Brief in Opposition, at 7-8, the defendants, as members of a planning committee formed under the auspices of the federally sponsored and funded Health Planning Council, developed a Joint Long Range Plan in 1971 intended to prevent the needless duplication of health care facilities. Plaintiff contended that this 1971 Report constituted the "game plan" of the conspiracy and told the jury that the Report "ultimately became the plan for hospital development in Raleigh, or to put it another way, the plan of the conspirators." (Tr. at 17-18.)

At that time, however, applicable federal statutes authorized and encouraged such voluntary planning activity. For example, the 1966 Amendments to the Health Planning Act provided funding for "developing . . . comprehensive . . . local area plans for coordination of existing and planned health . . . facilities" and encouraged "cooperative efforts among governmental or nongovernmental . . . groups" in such planning efforts.[3] Similarly, as the Fourth Circuit recognized, the 1964 Amendments to the Hill-Burton Act were "intended to prevent construction of facilities which are not needed or are poorly located" and to avoid "the unnecessary duplication of services and facilities" *quoting* S. Rept. No. 1274, 88th Cong. 2d Sess. 3 (1964) (Pet. App. A at 7a-8a).

3. On appeal, all that the Fourth Circuit decided was that defendant was entitled to show the "reasonableness of challenged planning activities" in light of this overall statutory scheme.[4] (Pet. App. A at 12a.) The Fourth Cir-

---

[3] Comprehensive Health Planning and Public Health Services Amendments of 1966, §§ 314(a)(2)(D) & (b), Pub. L. No. 89-749; 80 Stat. 1180 (1966) (*codified in* 42 U.S.C. §§ 246(a)(2)(b) & (b) (1976)). (*See generally*, Resp. Br. in Opp. at 5-6 & Pet. App. A at 7a-11a.)

[4] The Government admits that voluntary planning conduct was contemplated by then-existing health care planning legislation. (Gov't Br. at 12 n.15.) The Government also does not contradict the Fourth Circuit's interpretation of the then existing statutory

cuit did not, as the Government suggests, pass upon whether the alleged exclusionary conduct before the MCC came within its test if that conduct abused the "North Carolina administrative and judicial processes." (*See* Gov't Br. at 8 & 12; Pet. App. A at 10a-11a.)

The Fourth Circuit found that in light of federal health care legislation, voluntary participation in "planning activities" intended to avoid "needless duplication in health care resources" would not violate the antitrust laws. (Pet. App. A at 11a.) In reconciling the statutory scheme with the antitrust laws as required by *National Gerimedical* and *Silver*, the Fourth Circuit "specifically" held that " 'planning' under this special rule of reason is not 'reasonable' if its purpose or effect is only to protect existing health care providers from the competitive threat of potential entrants. . ." (Pet. App. A at 11a.) Such a result is consistent with the test enunciated by the Court in *National Gerimedical* and consistent with the position taken by the Government in that case.

The Court in *Gerimedical* recognized that immunity would be appropriate in some cases such as where "Congress specifically contemplated" the action. (452 U.S. at 391 & n.18.) (*See* Resp. Br. in Opp. at 21-23.) In the health care field where Congress has legislated widely, the "proper approach" in reconciling the "statutory scheme" of these laws and the antitrust laws, is an "analysis which reconciles the operation of both. . . ." (*Gerimedical*, 452 U.S. at 392, *quoting Silver*, 373 U.S. at 357.) In its Brief as Amicus Curiae in *Gerimedical*, the United States also recognized that "there may be occasions in implementing health systems plans when an implied exemption might be necessary in order to effectuate the statutory

---

scheme. (*Compare* Gov't Br. at 3 n.4 *with* Pet. App. A at 7a-11a.) That entire statutory scheme has since been superseded by subsequent legislation and is not likely to be subject to interpretation in any other case in an antitrust context due to the operation of the statute of limitations.

scheme as required by Congress . . . ." (Amicus Br. at 16 n.11.)[5]

Here, the Fourth Circuit found a statutory purpose to encourage private participation in local planning in an effort to avoid "needless duplication," and found that planning undertaken to that end was "envisioned," i.e. contemplated, by Congress. (Pet. App. A at 10a; *see* Resp. Br. in Opp. at 22-23.) The Fourth Circuit test provides a workable means of applying *Gerimedical* and *Silver* to determine whether the planning conduct, as distinct from a sham opposition before the MCC, constituted a *per se* violation of the antitrust laws.[6] Thus, on remand, defendants will finally be given an opportunity to develop the record as to the true nature of their planning conduct by informing the jury of the wording of existing federal legislation which contemplated and encouraged their planning efforts. This opportunity was denied to them by the district court because of its *per se* approach to the case.

B. In Any Event, Certiorari Is Interlocutory Because a New Trial Is Necessary on *Noerr-Pennington* Issues that Are Not Before this Court

The Fourth Circuit also ruled that the trial court committed error on two additional grounds under the *Noerr-Pennington* doctrine. Although either of these grounds may be dispositive of the case on remand, neither

---

[5] The Justice Department is also seeking legislation that will reduce antitrust enforcement in other areas where cooperation may be preferable to competition, such as joint research ventures.

[6] Far from creating a "novel" rule of reason inquiry as the Government asserts at page 9, the Fourth Circuit relied upon the language of *Silver* to craft its "good faith" inquiry into the existence of an implied antitrust immunity under the "aegis of the rule of reason." (373 U.S. at 360, 366.) The Court in *Silver* specifically held that "the interposing of a substantive justification in an antitrust suit" could be "governed by a standard of arbitrariness, *good faith*, reasonableness or some other measure." (373 U.S. at 366; emphasis supplied.)

of them is before the Court on the present petition for certiorari. The Government tries to avoid the obvious interlocutory nature of this appeal by suggesting that, if the Supreme Court reverses on the implied immunity issue, the Fourth Circuit might find that these other errors were harmless. (Gov't Br. at 14-15 n.18.) Such wishful thinking ignores the fundamental nature of the errors committed by the lower court.

1. The district court repeatedly instructed the jury that conduct which was "part of an overall scheme" was unprotected by *Noerr-Pennington*, not only in the context of conduct in abuse of the adjudicatory process but also standing alone. (Gov't App. at 1a-4a.) The Fourth Circuit properly recognized the plain error in these instructions because a "larger scheme" without any instance of abuse is not enough to deprive defendants of their First Amendment immunity. (Pet. App. A at 15a.) As this Court held in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), such "larger scheme" instructions are not harmless error because of the "obviously telling nature" of such evidence.[7] (381 U.S. at 670.)

2. The Fourth Circuit also held that, on retrial, the jury could not consider the acts of the Assistant Attorney General as constituting conduct in furtherance of an antitrust conspiracy. (Pet. App. A at 17a.) Such evidence was presented to the jury to prove that defendants had

---

[7] The trial court charged the jury that:

> If the courts are used or litigation is filed *as part of an overall scheme* to attempt to monopolize or exclude competition from the marketplace or otherwise violate the antitrust laws, that conduct does not enjoy antitrust immunity.

(Gov't App. at 4a; emphasis supplied.)

In *Pennington*, this Court held:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone *or as a part of a broader scheme* itself violative of the Sherman Act.

(381 U.S. at 670; emphasis supplied.)

abused the administrative process established to license plaintiff's hospital.[8] It is inconceivable that the Fourth Circuit on remand would not mandate a new trial on this ground alone, given the uniquely prejudicial nature of this evidence.

Accordingly, this Court should deny the writ due to the interlocutory nature of the record. *See, e.g.*, R. Stern, E. Gressman, *Supreme Court Practice* ¶ 4.19 at 300 (5th ed. 1978).

II. THE CROSS-PETITION IN NO. 82-1762 SHOULD BE GRANTED IF CERTIORARI IS GRANTED IN NO. 82-1633

Although it strains to find reasons why this Court should grant certiorari in No. 82-1633, the Government completely ignores the conflicts between the circuits which justify review of both of the issues raised in the Cross-Petition.

1. As Cross-Petitioners demonstrated, the trial court erred in failing to submit a special interrogatory on the critical issue of plaintiff's standing. In opposition, the Government argues that this issue was presented to the jury through Interrogatory No. 4, which dealt with the issue of proximate causation. (Gov't Br. at 17.) In fact, however, the issue of *standing* raised by the question of plaintiff's lack of preparedness to construct a new hospital presents an issue of fact separate and distinct from the issue of *proximate causation.* The jury could have found separately for defendant on this issue if the spe-

---

[8] As described by the Government, the anticompetitive conduct at issue here was an attempt to exclude plaintiff from the market through an "abuse of the North Carolina administrative and judicial processes. . . ." (Gov't Br. at 12.) In its instructions the trial judge cited to "conspiracy with representatives of an adjudicatory agency" as a specific instance of abuse. (Gov't App. at 3a.) The Fourth Circuit ruled that the evidence of participation in such a conspiracy was insufficient as a matter of law. (Pet. App. A at 17a). This error alone invalidates the Government's assumption that defendants' conduct necessarily involved some sort of "abuse."

cial interrogatories had been properly presented. (*See* Reply of Cross-Petitioners at 2.) The Government fails to address this crucial distinction, which puts the conflict between the circuits squarely before this Court for decision. (Cross-Petition at 10-11.)

2. As to the *Brunswick* issue raised by Cross-Petitioners, the Government fails to address the conflict between the decision of the Fourth Circuit here and those of the Second Circuit in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), and the Sixth Circuit in *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir.), *cert. denied*, 454 U.S. 893 (1980). (*See* Cross-Petition at 13-14; Reply of Cross-Petitioners at 3-4.) Indeed, the Government does not even cite those decisions. (*See* Gov't Br. at 18-20.)

CONCLUSION

For the reasons stated above and in the earlier briefs of Respondents Cross-Petitioners, the petition in No. 82-1633 should be denied but, if it is granted, the Court should also grant the petition No. 82-1762.

RAY S. BOLZE
(Counsel of Record)
ROBERT J. BROOKHISER
RONALD K. PERKOWSKI
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

THOMAS W. STEED, JR.
NOAH H. HUFFSTETLER III
DEAN M. HARRIS
MOORE, VAN ALLEN & ALLEN
Post Office Box 2058
Raleigh, North Carolina 27602
(919) 828-4481

Counsel for
Respondents/Cross-Petitioners

Dated: September 16, 1983